SUPREME COURT OF THE UNITED STATES.

Nos. 39 and 40.—October Term, 1925.

Marianna Matthews, Plaintiff in Error, 39 *vs.* Louis J. Huwe, as Treasurer of Hamilton County, Ohio.	Writs of Error to the Court of Appeals for the First Judicial District of the State of Ohio.
Mortimer Matthews, Plaintiff in Error, 40 *vs.* Louis J. Huwe, as Treasurer of Hamilton County, Ohio.	

[November 30, 1925.]

Mr. Chief Justice Taft delivered the opinion of the Court.

Marianna Matthews owns one tract of land, and Mortimer Matthews five others, in Hamilton County, Ohio. They lie within half a mile of Section X of the Glendale and Milford Road. The plaintiffs brought suits under Section 12075 of the General Code of Ohio, providing that Common Pleas Courts may enjoin the illegal levy or collection of taxes and assessments, to enjoin the county treasurer, the defendant in error, from collecting assessments made and levied on these lands for the cost of the improvement of Section X. Among other grounds for the petitions were allegations that the proceedings to assess were in violation of the Fourteenth Amendment of the Federal Constitution, in that they took away property from the plaintiffs without due process of law. In the Common Pleas Court the injunctions were sustained to the extent of some interest found to be excessive, but were denied in other respects. An appeal was taken to the Court of Appeals of Hamilton County, which affirmed the decrees of the Common Pleas Court. Appeals as of right were then prosecuted to the Supreme Court of the State, based on the ground that the cases involved constitutional questions. The Supreme Court made the following order in each case:

"Dec. 27, 1923. . . . This cause came on to be heard upon the transcript of the record of the Court of Appeals of Hamilton

County, and it appearing to the Court that this cause was filed as of right, and that the record presents no debatable constitutional question, it is ordered that the petition in error be, and the same hereby is dismissed."

"It is further ordered that defendant in error recover from the plaintiff in error his costs herein expended, taxed at $....."

Thereupon writs of error were applied for and allowed not to the Supreme Court of Ohio, but to the Court of Appeals. Motions are now made to dismiss the writs.

We think the motions must be granted. In *Hetrick* v. *Village of Lindsay*, 265 U. S. 384, Hetrick brought suit under the same section of the Ohio Code to enjoin the illegal collection of a special assessment. The injunction was denied in the Common Pleas Court and in the Court of Appeals, on appeal. The plaintiff filed a petition in error in the Supreme Court of the State. The defendant moved to dismiss on the ground that no leave to file it had been granted. The plaintiff claimed that no leave was necessary under the Ohio practice, because the case involved a question under the Constitution of the United States, and the appeal was of right. The Court sustained the motion to dismiss, on the ground that the statute whose validity was attacked had been so long held constitutional by the courts of the State that it could no longer be questioned. A writ of error to bring the case here was allowed by the Chief Justice of the Ohio Supreme Court and entertained by this Court. That case is exactly like this except as to the court to which the writ of error was directed.

The plaintiffs in error rely on the case of *Norfolk and Suburban Turnpike Company* v. *Commonwealth of Virginia*, 225 U. S. 264, and the rule laid down by Chief Justice White, in which he said (at p. 269):

"for the purpose of avoiding the complexity and doubt which must continue to recur and for the guidance of suitors in the future, we now state that, from and after the opening of the next term of this court, where a writ of error is prosecuted to an alleged judgment or a decree of a court to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the Crovo case, and shall therefore by not departing from the face of the record, solve

against jurisdiction the ambiguity created by the form in which the state court has expressed its action."

Western Union Telegraph Company v. *Crovo,* 220 U. S. 364, 366, was a Virginia case, in which a writ of error was denied by the Supreme Court of Appeals under a local practice, because the Court thought "the judgment was plainly right." The law and equity court, that is the lower court, was held to be the highest court of the State to which the case could be carried, and the writ of error from this Court to that court was sustained, a federal question being properly saved.

We think, however, that in these cases, as in the *Hetrick* case, on the face of the record the State Supreme Court did pass on the merits of the case by holding that the questions involving the Constitution of the United States, and being the only ground for a writ of error from this Court, were not debatable. It is one of those not infrequent cases in which decision of the merits of the case also determines jurisdiction. The petition was dismissed, not because the Court was really without jurisdiction, for it could have taken it, but because the question was regarded as frivolous, which is a different thing from finding that the petition was not in character one which the Court could consider.

Another reason why the motion must be dismissed, even if the foregoing conclusion were wrong, is that the plaintiffs in error did not exhaust all their remedies for review by the Supreme Court of the State. After their petitions for writs of error as of right were denied, they had under the Ohio practice the right to apply to the Supreme Court in its discretion for writs of certiorari to bring the cases to that Court for its consideration. No such application was made.

In *Stratton* v. *Stratton,* 239 U. S. 55, another Ohio case, a writ of error was directed to the Court of Appeals to reverse a judgment of that Court, on the ground that it was the highest court in which a decision in the suit could be had. It was held, however, that as the Supreme Court by the constitution of the State had authority to review the judgments and decrees of the Courts of Appeal by certiorari and no application had been made therefor, the Appellate Court could not be considered the court of last resort and a writ of error from this Court to that would not lie. The same view was taken in *Andrews* v. *The Virginian Railway Company,* 248 U. S. 272. The plaintiffs in error are thus in a

dilemma from which they cannot escape. If the Supreme Court by final decree disposed of the constitutional questions on the merits by dismissal of the petition, then the writ of error lay to the Supreme Court. If it did not, then the decree of the Court of Appeals did not become that of the highest court to which a writ of error would lie from this Court for lack of application for certiorari.

The motions to dismiss must be granted.

A true copy.

Test:

Clerk, Supreme Court, U. S.